No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Department of Homeland Security has long engaged in "a regular practice * * * known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999). On November 20, 2014, the Secretary issued a memorandum (Guidance) directing his subordinates to establish a process for considering deferred action for certain aliens who have lived in the United States for at least five years and either came here as children or already have children who are U.S. citizens or permanent residents.

The questions presented are:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, to challenge the Guidance because it will lead to more aliens having deferred action.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance is invalid because it did not go through the APA's notice-and-comment rulemaking procedures.

4. Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.

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STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 809 F.3d 134. The opinion of the court of appeals denying a stay pending appeal (Pet. App. 156a-243a) is reported at 787 F.3d 733. The opinion of the district court (Pet. App. 244a-406a) is reported at 86 F. Supp. 3d 591.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2015. The petition for a writ of certiorari was filed on November 20, 2015, and was granted on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Legal Framework

1. "The federal power to determine immigration policy is well settled." *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). It is grounded in the Constitution's text, U.S. Const. Art. I, § 8, Cls. 3 and 4, and the national government's "inherent power as sovereign to control and conduct relations with foreign nations." *Arizona*, 132 S. Ct. at 2498.

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, charges the Secretary of Homeland Security "with the administration and enforcement of th[e INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1).[1] The Secretary is vested with the authority to "establish such regulations; * * * issue such instructions; and perform such other acts as he deems necessary," and to have "control, direction, and supervision" of all DHS employees. 8 U.S.C. 1103(a)(2) and (3). Congress has specifically tasked the Secretary with responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5).

2. The removal of aliens is entrusted exclusively to the federal government. *Arizona*, 132 S. Ct. at 2506. Aliens are removable if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of

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[1] Congress has transferred to the Department of Homeland Security (DHS) most of the functions of the former Immigration and Naturalization Service (INS). *E.g.*, 6 U.S.C. 202(3), 271(b), 557. Unless otherwise indicated, references to the actions of DHS and the Secretary include actions by their predecessors.

certain crimes, or meet other criteria set by federal law." *Id.* at 2499; see 8 U.S.C. 1182(a), 1227(a).

The federal government cannot remove every removable alien, however. Rather, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. DHS, "as an initial matter, must decide whether it makes sense to pursue removal at all." *Ibid.* It must further decide, *inter alia*, whether to initiate removal proceedings, settle or dismiss, stay a final order, appeal an adverse ruling, and execute a removal order. J.A. 239-263. Every step implicates allocation of limited enforcement and detention resources. And "[a]t each stage the Executive has discretion to abandon the endeavor." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*).

3. Like other agencies exercising enforcement discretion, DHS must balance "a number of factors which are peculiarly within its expertise." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Those factors include "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all," *ibid.*, as well as "immediate human concerns," such as "whether the alien has children born in the United States [or] long ties to the community," *Arizona*, 132 S. Ct. at 2499.

Limited appropriations make broad discretion a practical necessity. Although the total undocumented population has not increased in recent years, an estimated 11 million undocumented aliens currently live in the United States. Pet. App. 5a. Congress has appropriated approximately $6 billion for "enforce-

ment of immigration and customs laws, detention and removals, and investigations." Consolidated Appropriations Act, 2016 (2016 Appropriations Act), Pub. L. No. 114-113, H.R. 2029, Div. F, Tit. II, 114th Cong., 1st Sess. 256; DHS Appropriations Act, 2015 (2015 Appropriations Act), Pub. L. No. 114-4, Tit. II, 129 Stat. 42. Numbers of removals have varied depending on circumstances, with DHS setting records for removals in a year (approximately 440,000 in 2013) and over a six-year span (more than 2.4 million from 2009 through 2014). DHS, *Yearbook of Immigration Statistics: 2013 Enforcement Actions, Tbl. 39, Aliens Removed or Returned: Fiscal Years 1892 to 2013* (2014); DHS Press Release, DHS Releases End of Year Statistics (Dec. 19, 2014). But in any given year, more than 95% of the undocumented population will not be removed, and aliens continue to be apprehended at the border or otherwise become removable.

Congress has mandated certain actions, such as detention of criminal aliens and aliens apprehended illegally crossing the border. See 8 U.S.C. 1225(b), 1226(c). Congress has also directed the Secretary to prioritize removal of criminal aliens "by the severity of th[e] crime," and has directed U.S. Immigration and Customs Enforcement (ICE) to use at least $1.6 billion to identify and remove criminal aliens. 2016 Appropriations Act 256; DHS Appropriations Act, 2009, Pub. L. No. 110-329, Div. D, Tit. II, 122 Stat. 3659. But as relevant here, Congress has otherwise left it to the Secretary's discretion to "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. 202(5).

4. "Deferred action" is one of the well-established ways in which DHS exercises enforcement discretion.

Deferred action is "a regular practice" in which the Secretary "exercis[es] [his] discretion for humanitarian reasons or simply for [his] own convenience," to notify an alien of a non-binding decision to forbear from seeking his removal for a designated period. *AADC*, 525 U.S. at 483-484; see 8 C.F.R. 274a.12(c)(14) ("an act of administrative convenience to the government which gives some cases lower priority"). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *AADC*, 525 U.S. at 484 (quoting 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)), a removable alien may remain present so long as DHS continues to forbear.

Deferred action does not confer lawful immigration status or provide any defense to removal. An alien with deferred action remains removable at any time, and DHS has absolute discretion to revoke deferred action unilaterally, without notice or process. See *AADC*, 525 U.S. at 484-485. An alien's continued presence during a period of deferred action does not violate any criminal law, because "[r]emoval is a civil, not criminal, matter," and "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2499, 2505.

Since 1960, DHS has established more than 20 policies for exercising discretion via deferred action or similar practices for large groups of individuals in defined categories. See pp. 48-60, *infra* (detailing history); see also J.A. 64-65. Among others, a 1960 policy accorded "extended voluntary departure" to undocumented Cuban nationals in the United States after the Cuban revolution. H.R. Rep. No. 627, 100th

Cong., 2d Sess. 6 (1988) (*EVD Report*). A 1987 and 1990 "Family Fairness" policy accorded "indefinite voluntary departure" to undocumented spouses and children of aliens with legalized status, potentially encompassing 1.5 million people. J.A. 65, 292; see p. 56, *infra*. In 1997 and 2000, the INS established deferred-action policies for aliens who sought (but had not yet obtained) lawful status as battered spouses or victims of human trafficking, respectively. J.A. 66-67. A 2005 policy accorded deferred action to foreign students affected by Hurricane Katrina. J.A. 68-69. A 2009 policy accorded deferred action to certain widows and widowers of U.S. citizens who had "no avenue of immigration relief." J.A. 69 (citation omitted). And in 2012, DHS implemented the Deferred Action for Childhood Arrivals (DACA) policy to accord deferred action to certain aliens who came to this country as children and have lived here since 2007. J.A. 70-71.

Congress has repeatedly enacted legislation that takes as a given DHS's authority to accord deferred action. Congress has provided that States participating in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, may (but are not required to) issue driver's licenses to aliens with "approved deferred action status." 49 U.S.C. 30301 note. Congress has specified that certain aliens who self-petition for relief under the Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. V, 108 Stat. 1092, are eligible to request "deferred action." 8 U.S.C. 1154(a)(1)(D)(i)(II) and (IV). Certain family members of lawful permanent residents killed on September 11, 2001, or of citizens killed in combat, are "eligible for deferred action." USA PATRIOT Act, Pub. L. No.

107-56, § 423(b), 115 Stat. 361; see National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1694-1695. And 8 U.S.C. 1252(g) prevents an alien from challenging a decision to deny deferred action. See *AADC*, 525 U.S. at 485.

5. Under longstanding federal law, several consequences flow from a decision to defer action.

a. Without the ability to work lawfully, individuals with deferred action would have no way to lawfully make ends meet while present here. Accordingly, work authorization has long been tied to the exercise of this kind of discretion. See pp. 50-53, *infra*. Specifically, aliens with deferred action—like many other aliens—may apply for and obtain work authorization based on economic need. 8 C.F.R. 274a.12(a), (b), (c), and (c)(14). This longstanding regulation is grounded in the Secretary's general authority to administer the INA. 8 U.S.C. 1103(a); 46 Fed. Reg. 25,080-25,081 (May 5, 1981). And acting against the backdrop of that regulation, Congress has made it explicit that an alien may be lawfully hired if he is a lawful permanent resident or is "authorized to be so employed by th[e INA] *or by the Attorney General*" (now Secretary). 8 U.S.C. 1324a(h)(3) (emphasis added); see 52 Fed. Reg. 16,221, 16,228 (May 1, 1987).

b. Aliens with deferred action are ineligible for most federal public benefits. In general, only "qualified" aliens are eligible to participate in federal public benefit programs, and deferred action does not make an alien "qualified." See 8 U.S.C. 1611(a), 1641(b). Aliens with deferred action thus cannot receive food stamps, Supplemental Security Income, temporary aid for needy families, and many other federal public

benefits. Dep't of Health & Human Servs., *Summary of Immigrant Eligibility Restrictions Under Current Law* (Feb. 25, 2009).

A non-qualified alien is not categorically barred, however, from participating in certain federal earned-benefit programs associated with lawfully working in the United States—the Social Security retirement and disability, Medicare, and railroad-worker programs—so long as the alien is "lawfully present in the United States *as determined by the [Secretary].*" 8 U.S.C. 1611(b)(2)-(4) (emphasis added). An alien with deferred action is considered "lawfully present" for these purposes. 8 C.F.R. 1.3(a)(4)(vi); *e.g.*, 42 C.F.R. 417.422(h). Deferred action does not itself entitle an alien to receive payments under these programs, however; he must earn them and satisfy every other requirement. For example, a person ordinarily must work and pay into the system for ten years to become eligible for Social Security retirement benefits. See 42 U.S.C. 413, 414(a)(2).

c. Under federal law, deferred action does not make an alien eligible for any "[s]tate or local public benefit." 8 U.S.C. 1621(a) and (c). Although States may provide certain minimal benefits to all aliens, see 8 U.S.C. 1621(b), they cannot provide additional benefits to aliens who are not "qualified" (and are not parolees or nonimmigrants),[2] unless the State affirma-

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[2] Nonimmigrant classes are defined in 8 U.S.C. 1101(a)(15). Parole is a mechanism by which the Secretary may, on a case-by-case basis, allow an applicant for admission, other than certain refugees, into the country for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5). "Advance parole" is an indication in advance of an alien's departure that DHS may

tively chooses after August 22, 1996 to provide them. 8 U.S.C. 1621(a) and (d). Deferred action does not make an alien "qualified" (or a parolee or nonimmigrant). 8 U.S.C. 1641(b). Deferred action thus does not trigger eligibility for unemployment or any other state or local public benefit, unless the State itself has voluntarily acted to extend that additional benefit on that basis.[3]

B. Factual And Procedural Background

1. On November 20, 2014, the Secretary issued two memoranda relevant here. The first directs DHS to focus its limited resources for removals, "to the greatest degree possible," on serious criminals, terrorists, aliens who recently crossed the border, and aliens who have significantly abused the immigration system. Pet. App. 426a; *id.* at 420a-429a. Under one estimate, 1.4 million people fell into the priority categories under this policy as of 2014. Marc R. Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement* 1 (July 2015).

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parole the alien into the country in the future, and is available on the same basis. 8 C.F.R. 212.5(f).

[3] Aliens accorded deferred action also cease accruing time for purposes of 8 U.S.C. 1182(a)(9)(B), which makes an alien inadmissible for three or ten years if he departs the United States after being "unlawfully present" for six months or a year. 8 U.S.C. 1182(a)(9)(B)(i). An alien is deemed "unlawfully present" for this purpose if he is present "after the expiration of the period of stay authorized by the [Secretary] or is present in the United States without being admitted or paroled." 8 U.S.C. 1182(a)(9)(B)(ii). DHS treats deferred action as a "period of stay authorized by the [Secretary]" that tolls this accrual of time. Memorandum from Johnny N. Williams, Exec. Assoc. Comm'r, Office of Field Operations, to Reg'l Dirs. et al., *Unlawful Presence* 1 (June 12, 2002).

The Secretary's second memorandum (the Guidance) complements that effort by announcing "new policies for the use of deferred action" for certain aliens who are not removal priorities. Pet. App. 412a; see *id.* at 411a-419a. The Guidance directs U.S. Citizenship and Immigration Services (USCIS) to expand the coverage criteria under the 2012 DACA policy to encompass aliens with a wider range of ages and arrival dates, and to lengthen the period of deferred action from two years to three. *Id.* at 415a-416a. The Guidance also directs USCIS "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis," for certain parents of U.S. citizens or lawful permanent residents. *Id.* at 416a-417a. This process is known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). *Id.* at 2a. To request consideration for deferred action via DAPA, an applicant must: (1) as of November 20, 2014, be the parent of a U.S. citizen or lawful permanent resident; (2) have continuously resided here since before January 1, 2010; (3) have been physically present here on November 20, 2014, and when applying for relief; (4) have no lawful immigration status on that date; (5) not fall within the Secretary's enforcement priorities; and (6) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." *Id.* at 417a.

The Secretary explained that the new policy would reach "hard-working people who have become integrated members of American society," have not committed serious crimes, and "are extremely unlikely to be deported given * * * limited enforcement resources." Pet. App. 415a. Deferring action for these

individuals, the Secretary continued, would support "this Nation's security and economic interests and make[s] common sense, because [it] encourage[s] these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted." *Ibid.* The Guidance emphasizes that it does not establish any right to deferred action and that deferred action "does not confer any form of legal status in this country" and "may be terminated at any time at the agency's discretion." *Id.* at 413a.

The Guidance states that USCIS was to begin accepting requests under the expanded DACA criteria no later than February 18, 2015, and under DAPA no later than May 19, 2015; and that USCIS would begin issuing three-year terms of deferred action under the original 2012 DACA criteria on November 24, 2014. Pet. App. 416a, 418a.

2. On December 3, 2014, respondent States (respondents) sued, seeking declaratory and injunctive relief against implementation of the Guidance. They alleged that the Guidance violates the Take Care Clause, U.S. Const. Art. II, § 3, Cl. 5; is arbitrary and capricious or otherwise not in accordance with law, 5 U.S.C. 706; and was subject to notice-and-comment rulemaking requirements, 5 U.S.C. 553. Pet. App. 9a. On February 16, 2015, the district court entered a nationwide preliminary injunction against implementing the Guidance. *Id.* at 407a-410a.

The court of appeals expedited the government's appeal. Pet. App. 2a. On May 26, 2015, a divided panel declined to stay the injunction pending appeal. *Id.* at 156a-210a. Judge Higginson dissented. *Id.* at 211a-243a.

On November 9, 2015, a divided panel affirmed the preliminary injunction. Pet. App. 1a-90a. The majority, consisting of the two judges who formed the stay-panel majority, held that "[a]t least one state"—Texas—has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, and that respondents are substantially likely to establish that notice-and-comment rulemaking was required. Pet. App. 20a; see *id.* at 11a-69a. The majority further held that the Guidance is "manifestly contrary" to the INA. *Id.* at 76a; see *id.* at 69a-86a.

Judge King dissented. Pet. App. 91a-155a. She criticized the "majority's breathtaking expansion of state standing," *id.* at 103a, and, like Judge Higginson, concluded that the Guidance involves non-reviewable matters that are committed to agency discretion by law, *id.* at 92a-93a. Judge King concluded that, if the Guidance is implemented as written, it would not be subject to notice-and-comment requirements. *Id.* at 93a. She also would have upheld the Guidance as substantively lawful. *Id.* at 146a-155a.[4]

SUMMARY OF ARGUMENT

The court of appeals struck down a federal immigration enforcement policy at the behest of a group of States that are not the objects of that policy. Its ruling violates bedrock limits of Article III and forces the federal courts to resolve complex debates over immigration policy that the Constitution reserves to the political Branches of the National Government.

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[4] The court of appeals subsequently entered an order permitting intervention by the intervenor-respondents (Jane Does), who claimed eligibility for deferred action via the Guidance. J.A. 5.

To make matters worse, having wrongly asserted jurisdiction over immigration policy, the court of appeals seriously misconstrued immigration law, upending more than 50 years of settled practice and stripping the Secretary of frequently-exercised discretion to provide deferred action to categories of aliens already living in our country. The ruling threatens great harm not only to the proper role of the federal courts and to federal immigration law, but also to millions of parents of U.S. citizens and permanent residents, aliens who are the lowest priorities for removal yet now work off the books to support their families. The decision below should be reversed.

I. Respondents' challenge to the Guidance is not justiciable.

A. Article III forecloses respondents' challenge to the Guidance. Respondents do not contend that the Guidance regulates any State directly or requires them to do (or not to do) anything. Instead, they invoke the jurisdiction of the federal courts based on the indirect and incidental effects that they allege will flow from the Guidance. But a State cannot establish standing based on a claim of injury from such effects of federal immigration policy. The Constitution assigns the formation and enforcement of immigration policy exclusively to the National Government. If individual States could challenge a federal immigration policy based on its incidental effects on a State's fisc, then States could routinely require the federal courts to resolve immigration policy debates, transgressing the Article III boundaries intended precisely to avoid entangling the courts in disputes that the Constitution commits to the political Branches. And the disregard for Article III's limitations is particular-

ly pronounced because the injury on which the court of appeals relied to find standing here—the cost to Texas of subsidizing temporary visitor driver's licenses for aliens—is entirely self-generated. Texas created and Texas can eliminate the effect of the link to federal law that allegedly has caused Texas harm. If such self-imposed harms were sufficient, then States could force disputes over a wide swath of federal policies into the federal courts by the simple expedient of linking a state tax or subsidy to a federal standard.

Massachusetts v. *EPA*, 549 U.S. 497 (2007), provides no support for such a revolution in standing law. Unlike this case, *Massachusetts* involved a rulemaking to create new standards, rather than discretionary enforcement under existing standards as to third parties; the link between the asserted injury and the federal action was not self-generated; the injury claimed by the States was an invasion of their independent and legally-protected sovereign interests in "the earth and air within [their] domain," *id.* at 519—not mere incidental effects of federal government action; and the States had a procedural right arising from a specific federal statute that is entirely absent here, *id.* at 523-526. The differences between *Massachusetts* and this case could not be more stark.

B. Respondents lack a right to sue under the APA because the interests they seek to protect are not within the zone of interests of any relevant provision of the INA. To meet this requirement, Texas asserts (Br. in Opp. 26-27) interests in "protecting [its] citizens by reserving jobs for those lawfully entitled to work" and "comment[ing] on administrative decisionmaking"—not the interests the court found to establish standing. But a plaintiff cannot mix-and-

match one interest for Article III standing and another interest for the APA, as the court permitted Texas to do. Moreover, recognition of the interests Texas set forth would effectively eliminate the zone-of-interests limitation for challenges under the INA. The court's treatment of standing and zone of interests thus delivered a one-two punch that effectively opens the federal courts to any State unhappy with federal immigration policy.

C. This suit is not justiciable for the added reason that the Guidance involves matters that are committed to agency discretion by law. Deferred action notifies an alien that DHS has made a non-binding decision to forbear for a period of time from removing him, and as a result the alien may be authorized to work lawfully during that period (and to participate in Social Security). Both components are equally unreviewable: The exercise of enforcement discretion is traditionally immune from judicial review. And Congress has similarly accorded the Secretary discretion to decide whether, as an attribute of enforcement discretion, aliens may be lawfully employed (and may participate in Social Security) while their presence has been countenanced. See 8 U.S.C. 1103(a), 1324a(h)(3), 1611(b).

II. The Guidance is a lawful exercise of the Secretary's authority.

A. The discretion vested in the Secretary by the INA provides ample authority for the Guidance. Millions of undocumented aliens live and work in this country, and Congress has directed the Secretary to focus his limited resources on removing serious criminals and securing the border. The Guidance addresses this difficult situation forthrightly, and does so by invoking the well-established practice of deferred

action and work authorization. By deferring action for individuals who are *not* priorities for removal, the Guidance enables DHS to better focus on its removal priorities. It advances "immediate human concerns," by extending a measure of repose to individuals who have long and strong ties to the community. *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). And it encourages "hard-working people who have become integrated members of American society" to "come out of the shadows" and work on the books, thus mitigating competitive harm to American workers. Pet. App. 415a.

B. The Guidance has deep historical roots. DHS and the INS have adopted more than 20 similar policies in the last 50 years, using deferred action or similar forms of discretion for large numbers of aliens in defined categories who were already living here without lawful status. At least since the early 1970s, every one of those policies has resulted in eligibility for work authorization, and that practice was codified in formal regulations in 1981. Fully aware of those practices, Congress has repeatedly ratified DHS's authority. See, *e.g.*, 8 U.S.C. 1324a(h)(3).

C. Respondents cannot explain how the Guidance is unlawful in light of this statutory and historical backdrop. Respondents contend that the Secretary can authorize deferred action and work authorization only for aliens in categories Congress has expressly specified. But the INA itself and decades of history and practice refute that assertion. Respondents also contend (Br. in Opp. 1) that the Guidance's reach is simply too big. But they appear to agree that the Secretary has unreviewable discretion to provide a temporary reprieve to every one of the individuals the Guid-

ance could cover. *Id.* at 2, 20 n.7. And longstanding regulations, ratified by Congress and backed by decades of historical practice, further establish that the Secretary can authorize lawful work any time he exercises discretion through deferred action for an alien who needs to work to make ends meet while living here during that period of forbearance. See 8 C.F.R. 247a.12(c)(14).

III. Like every deferred-action or similar policy before it, the Guidance is a statement of policy regarding how DHS will exercise discretionary authority—not a binding rule that required notice-and-comment procedures. Indeed, no such policy has ever been put through notice-and-comment procedures.

The court of appeals concluded that this policy was uniquely different, reasoning that individual DHS agents must have discretion to reject requests for deferred action, even when the Secretary's stated criteria are satisfied. But a blanket deferred-action policy is no less a "policy" than one that also gives rank-and-file agents authority to be less forgiving for case-specific reasons. And any concerns the court had about the lack of discretion were at best premature. DHS has not yet implemented the Guidance, and on its face it requires precisely the discretion the court believed necessary.

IV. The Take Care Clause furnishes no basis for relief. Respondents merely use the Take Care Clause to dress up their misguided statutory arguments in constitutional garb. A Take Care question also is not justiciable, and respondents have no cause of action to raise such a claim. And in any event, the Secretary is faithfully executing the weighty and complex task of administering and enforcing the INA.

ARGUMENT

I. THIS CASE IS NOT JUSTICIABLE

This suit is not justiciable because respondents lack Article III standing to challenge the Guidance, their claimed injury is outside the "zone of interests" protected by any relevant INA provision, and the Guidance involves matters that are committed to agency discretion by law.

A. Respondents Lack Article III Standing

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (citations omitted). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). To establish standing, a plaintiff must show, at a minimum, that it has suffered an individualized injury to a "legally protected interest," that the injury is "fairly traceable" to the defendant's challenged conduct, and that the injury is redressable by a favorable decision. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 134 (2011) (brackets and citation omitted). Unless that showing is made, "courts have no charter to review and revise legislative and executive action," *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009), and engaging in such review "would be inimical to the Constitution's democratic character," *Winn*, 563 U.S. at 133.

Respondents cannot satisfy these "essential and unchanging" Article III requirements. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The

Guidance is a federal immigration policy that does not regulate States, require States to do (or refrain from doing) anything, or restrict States in any way. Respondents nonetheless claim injury from incidental effects that they allege will result from implementation of the Guidance. But it would be extraordinary to find Article III standing based on such assertions by a State, as virtually any administration of federal law by a federal agency could have such effects. Nor does Texas suffer Article III injury as a result of any increased costs it might incur to provide subsidized driver's licenses to those who receive deferred action as a result of the Guidance. That injury is one of Texas's own making. Texas has voluntarily chosen to subsidize those driver's licenses, and it could eliminate that subsidy at any time. There is no precedent in our Nation's history for adjudicating the merits of a challenge to the federal government's enforcement policy choices on such a self-generated basis, which is itself a telling indication that such suits are not justiciable. Cf. *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010).

The Constitution reserves exclusive authority to the National Government to make and enforce immigration policy. The Nation requires uniform policies that may depart from what some individual States might prefer. Allowing claims like those respondents press here to proceed would upend the constitutional design by enmeshing the courts in all manner of disputes between the federal government and a State, or competing factions of States, over immigration policy.

1. Respondents lack Article III standing to challenge the Guidance on the basis of its incidental effects

a. A plaintiff who is not himself the object of challenged government action or inaction faces a considerable burden to establish standing. See *Lujan*, 504 U.S. at 562. That burden becomes well-nigh insurmountable when a plaintiff claims to be injured by the incidental effects of federal enforcement policies and the consequences that flow from those policies under federal law. "[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). An individual thus "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Ibid.* An individual similarly has "no judicially cognizable interest in procuring enforcement of the immigration laws" against someone else. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984). And an individual generally lacks standing to challenge the government's provision (or denial) of benefits to a third party. *E.g.*, *Cuno*, 547 U.S. at 342-346; cf. *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980) (discussing "[t]he simple distinction between government action that directly affects a citizen's legal rights" and "action that is directed against a third party and affects the citizen only indirectly or incidentally").

These Article III principles apply with particular force in a case like this, where a State is relying on the incidental effects of federal immigration-enforcement policies to challenge those policies. The Constitution assigns the formation and enforcement of immigration policy exclusively to the National Government *precise-*

ly because immigration is an inherently national matter. See *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012) ("Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."); cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.") (citation omitted).

State officials may well dispute the lawfulness or wisdom of federal immigration policy judgments. But a State cannot establish its own immigration policies or undertake the removal of aliens, based on its own interests or its own evaluation of the costs and benefits of the federal approach. *Arizona*, 132 S. Ct. at 2506. And States may disagree not only with the federal government, but also (as here) with each other. But such divergent views, no matter how strongly held, must be addressed to the National Government.

Within the National Government, it is the responsibility of the political Branches—not the federal courts—to establish and revise immigration policies for our Nation as a whole and, in so doing, to consider the views of different States. 6 U.S.C. 202(5). "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. If States could establish standing on the basis of the indirect effects of federal policy choices regarding immigration enforcement, federal courts would be drawn into all manner of generalized grievances at the behest of

individual States that disagree with federal policy judgments. Such a rule would enable any State to make an end-run around the structural limitations on its authority and cause the very sort of harms those limitations are intended to prevent.

b. This suit cannot survive these critical limitations on the judicial power. Respondents' claims of injury are nothing more than allegations of indirect or incidental effects from the Guidance, not invasions of any legally-protected interest under the Constitution or the INA.

Respondents' principal claims of injury center on allegations (Br. in Opp. 17) that the Guidance will cause them to incur increased costs of healthcare, education, and law enforcement, and will cause citizens in their States to face increased labor competition. But incidental effects of this sort arise inevitably from a wide range of federal immigration policy decisions. Indeed, the mere presence of any aliens within the country can have such effects.[5] And, beyond immigration, such effects on States and their citizens could result from federal policies of all sorts.

The Framers established a national government with the power to act directly upon individuals, not upon the States as under the Articles of Confederation. See *New York* v. *United States*, 505 U.S. 144,

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[5] These claims also fail on their own terms. See Pet. App. 309a-310a. The alleged fiscal costs flow from aliens' mere presence in this country, and the Guidance applies only to aliens who have already been living here since 2010 and are "extremely unlikely" to be removed with or without the Guidance. *Id.* at 414a-415a. Respondents' claim that the Guidance will incidentally cause competitive harm in the labor markets is similarly unfounded because the Guidance is designed to *ameliorate* distortions of the labor markets. See p. 46, *infra*.

162-166 (1992); see also *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838-845 (1995) (Kennedy, J., concurring). It is to be expected that actions of the federal government affecting individuals within a State may in turn generate incidental effects on that State with respect to its own governmental actions affecting those same individuals. But the necessary autonomy inherent in the Constitution's framework of separate sovereigns, each acting directly upon individuals, is inconsistent with the notion that a State has a legally-protected interest in avoiding the incidental effects that are derivative of the federal government's actions affecting residents of the State. Those everyday emanations of federal government action therefore cannot be the basis for a State to invoke the jurisdiction of an Article III court to challenge such action, much less to challenge the merits of federal immigration policy, and the court of appeals correctly did not rely upon them.[6]

The court of appeals nonetheless plucked out one particular incidental effect of the Guidance and found it sufficient to establish standing: that Texas will experience "substantial pressure" to eliminate a state-law subsidy it offers for aliens with deferred action (and other categories of aliens). Pet. App. 20a. Specifically, the court relied on the district court's findings that Texas has chosen to subsidize the costs of issuing driver's licenses, and that deferred action

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[6] This Court's *parens patriae* jurisprudence reinforces these structural principles, for "it is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923).

makes aliens eligible for licenses under state law. *Id.* at 11a-36a. Because the Guidance will lead to more aliens in Texas being accorded deferred action, the court of appeals reasoned, it will lead to more people applying for licenses, which will increase the subsidy's overall cost or cause Texas to face "substantial pressure" to eliminate the subsidy. *Id.* at 20a-21a.

This alleged injury, however, is no less incidental than the other claims of injury that the courts below properly declined to rely upon as a basis for standing. Texas's asserted injury is, moreover, a self-generated effect resulting from its own decision to subsidize the costs of issuing driver's licenses, including to many categories of aliens, and Texas could eliminate that subsidy at any time. As we next demonstrate, it is particularly improper to take the extraordinary step of finding that a State has standing to challenge national immigration policies on that basis.

2. A State cannot challenge the Guidance on the basis of an indirect and incidental effect when the State created the causal link that produces the effect

a. Article III's requirement to show injury "assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers*, 555 U.S. at 493 (citation omitted). But there can be no "real need" for a State to invoke the judicial power to challenge federal policies on the basis of their incidental effects on the State when *the plaintiff State itself* created the causal link that produces the unwanted effects. Any such injury is properly treated as self-inflicted, and not a legally cognizable injury or one that is fairly traceable to the challenged federal policy. See *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1152-1153

(2013); *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).

This Court has rejected a State's effort to claim standing on such a self-generated basis. In *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), this Court held that a State that chooses to extend a tax credit on the basis of another sovereign's actions does not thereby gain standing to challenge the other sovereign's policies by claiming that they have the incidental consequence of costing the complaining State money. Specifically, this Court concluded that Pennsylvania lacked standing to challenge a New Jersey tax that triggered a tax credit under Pennsylvania law and thereby reduced Pennsylvania's tax revenue. *Id.* at 662-664. The Court explained that "[n]o State can be heard to complain about damage inflicted by its own hand," and noted that "nothing prevents Pennsylvania from withdrawing [the] credit." *Id.* at 664.

Pennsylvania controls. Like the plaintiff State in *Pennsylvania*, Texas has created the only causal link between the challenged federal action (the Guidance) and its alleged injury (expenditure on a particular subsidy). Neither the Guidance nor any federal law required Texas to subsidize driver's licenses, issue licenses on the basis of "authorize[d]" presence, Tex. Transp. Code Ann. § 521.142(a) (West Supp. 2015), or define that term in a particular way. Indeed, Texas has exercised its independence in this area by defining "authorize[d]" presence with a list of categories of aliens that has no equivalent in federal law. See Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* 2-7 (July 2013). And, as the court of appeals recognized

(Pet. App. 24a), Texas can eliminate the causal link by "requiring applicants to pay the full costs of licenses." Alternatively, Texas could seek to increase prices for "temporary visitor" licenses for aliens, including those with deferred action. Tex. Transp. Code Ann. § 521.421(a-3) (West Supp. 2015). Or Texas could seek to raise the price specifically for aliens with deferred action in order to avoid the substantial additional costs it claims it will face. Because Texas can sever or alter the subsidy's link to federal law and thus eliminate the alleged harm, it cannot "be heard to complain" about the effects of the Guidance. *Pennsylvania*, 426 U.S. at 664.[7]

Texas argued below that *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), controlled, not *Pennsylvania*. But *Wyoming* is inapposite. Wyoming had standing to challenge an Oklahoma law that facially discriminated against the use of Wyoming coal in Oklahoma, on the grounds that it reduced Wyoming's revenues from a tax on in-state coal extraction. *Id.* at 442-446, 454.

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[7] In an amicus brief in *Arizona Dream Act Coalition* v. *Brewer*, 757 F.3d 1053 (9th Cir.), stay denied, 135 S. Ct. 889 (2014) (*ADAC*), which involved a challenge to Arizona's adoption of a prohibition against issuing driver's licenses to aliens with deferred action, the government took the position that a State may distinguish among categories of aliens, provided that it borrows federal immigration categories and has a "substantial, independent state justification" for its choices; mere disagreement with federal immigration policy does not suffice. Gov't C.A. Amicus Br. at 1-2, 14-16, *ADAC*, *supra* (No. 15-15307) (Aug. 28, 2015). Here, deferred action is a federal category. 8 C.F.R. 274a.12(c)(14). And avoiding substantially increased costs, together with the temporary and revocable nature of deferred action, could be a substantial, independent reason for eliminating a subsidy. In *ADAC*, Arizona did not seek to justify its change as a cost-saving measure. See Pet. App. 168a.

That is, the plaintiff State *was* the object of the defendant's challenged action: the defendant (Oklahoma) targeted Wyoming coal for particular burdens. And it was thus the defendant that forged the causal link between the two; Wyoming's tax depended solely on activity in Wyoming. By contrast, here the object of the Guidance is individual aliens, not any State. And it is the *plaintiff* that "tie[d] its law to that of another sovereign." Pet. App. 106a n.16 (King, J., dissenting). *Pennsylvania*, not *Wyoming*, therefore controls here.

b. Remarkably, the court of appeals seized on what should have been a dispositive reason to reject standing—that Texas can eliminate the alleged harm by severing or altering the link to federal law—and held that it was a basis *for* standing. As the court saw it, once Texas chose to provide a subsidy linked to federal law, a decision by Texas to use any mechanism to sever or alter that link—or even any "substantial pressure" Texas might feel to do so—was itself an Article III injury.

Even taking the court of appeals on its own terms, Texas has not demonstrated Article III injury. Texas has not changed its laws; indeed, it has carefully avoided taking any position on whether it actually would do so, what changes it would make, or on what basis it would make them if the Guidance took effect. This posture renders respondents' claim of injury too speculative and attenuated to confer standing—just as it would if Texas had brought an independent suit seeking a declaration that, *if* it changed its law, the new law would not be preempted.

More to the point, the court of appeals was wrong to hold that any perceived need by Texas to change its

law would itself qualify as an Article III injury. *Pennsylvania* itself establishes that action by Texas (or "substantial pressure" to consider action) to reduce or eliminate a voluntary subsidy linked to federal law is not a cognizable injury: Pennsylvania lacked standing because it could have avoided its self-inflicted harm by "withdrawing th[e] credit." 426 U.S. at 664. If the court of appeals were correct, *Pennsylvania* would have come out the other way: withdrawing the credit (or "substantial pressure" to do so) would itself have constituted Article III injury, and Pennsylvania would have had standing.

To be sure, federal law may impose some limitations on the range of permissible state policy choices. Although Texas is free to delink its subsidies entirely from federal immigration categories, if Texas chooses to retain a link it must take federal immigration law as it comes and cannot burden aliens solely because it disagrees with federal immigration policies. See note 7, *supra*. But whatever limitations federal law might impose on Texas if it someday and somehow changed its law would not be fairly traceable to the Guidance, which does not create or tighten those limitations. They would stem from the Constitution and the exclusive assignment of authority over immigration to the political Branches of the National Government. See *Arizona*, 132 S. Ct. at 2498; *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982). It would be fundamentally backwards to rely on the structural limitations on state authority as a basis for permitting a State, through the federal judiciary, to interfere with the federal government's administration of the immigration laws as to third-party aliens: Those limitations exist to

prevent individual States from interfering in these sensitive and inherently national affairs. *Ibid.*

3. **Massachusetts *v.* EPA *does not support respondents***

The court of appeals erred in concluding (Pet. App. 12a) that *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), justified its radical expansion of standing in this case. That case involved a rulemaking petition to require the Environmental Protection Agency (EPA) to set greenhouse-gas emissions standards, *id.* at 505, not discretionary enforcement of existing standards against third parties, as here. And unlike this case, the plaintiff State in *Massachusetts* did not create and could not eliminate the causal link between the challenged federal action (the government's refusal to regulate greenhouse gases) and the alleged injury (an incremental loss of the State's territory to rising seas). See *id.* at 526. The link "between manmade greenhouse gas emissions and global warming" existed independently as a matter of climate science. *Id.* at 523-525. This case is thus fundamentally unlike *Massachusetts*.

Beyond ignoring these dispositive distinctions, the court of appeals committed two further errors in radically expanding *Massachusetts*' "special solicitude." Pet. App. 12a. First, the interest Texas asserts is fundamentally unlike the one Massachusetts asserted, which was an independent and legally-protected interest in "the earth and air within its domain." 549 U.S. at 519 (quoting *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). The State's standing "hinge[d] on" that particularized sense of infringed sovereignty, *id.* at 537 (Roberts, C.J. dissenting), akin to the injury that would occur if a contiguous State redrew its boundaries to assert dominion over part of the com-

plaining State's territory. But as set forth above, see pp. 20-24, *supra*, Texas seeks to vindicate an interest that is not legally protected at all: an asserted interest in not experiencing indirect or incidental effects of federal immigration-enforcement policies.

Second, *Massachusetts* attached "critical importance" to the particular "procedural right" under the Clean Air Act, 42 U.S.C. 7607(b)(1), to challenge the EPA's denial of a petition for rulemaking on emissions standards. 549 U.S. at 516, 518. "[A] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. But the INA creates no procedural right for any third party to challenge immigration-enforcement and related policies. Instead, the INA insulates exercises of the Secretary's discretion from judicial review even by aliens who *are* the object of deferred-action policies. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-485 (1999); see 8 U.S.C. 1252(g); see also 5 U.S.C. 701(a). And the APA's provisions, which apply universally, are not analogous to the specific Clean Air Act provision at issue in *Massachusetts*. Indeed, *Lujan* rejects the view that the injury-in-fact requirement can be "satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573.

Thus, whatever the outer boundaries of the "special solicitude" recognized in *Massachusetts* may be, respondents' challenge to federal immigration policy is far outside those limits.

4. The court of appeals' radical expansion of state standing would force courts to hear a vast new range of challenges to federal policies

In the immigration context alone, the court of appeals' theory would give States virtually unfettered ability to conscript courts into entertaining their complaints about federal policies. Texas has extended the same license subsidy to myriad other groups of aliens—including aliens with parole, asylum, temporary protected status, and deferred enforced departure, and any alien with an employment authorization document, which itself also captures aliens with deferred action and dozens of other categories. See *Verifying Lawful Presence* 1-5. Under the court of appeals' reasoning, Texas would have standing to sue any time the federal government interprets the INA or adopts immigration policies affecting a substantial group of aliens in any of these categories. For example, a single State could have sued to block INS or DHS policies for exercising discretion as to Cubans in the 1960s; Vietnamese in the 1970s; Nicaraguans in the 1980s; Chinese and Salvadorans in the 1990s; Haitians in the 1990s and 2000s; as well as every prior or future deferred-action policy. See pp. 48-50, *infra* (collecting examples).

As these historical examples show, the exercise of immigration enforcement discretion will often be bound up with sensitive foreign policy imperatives, as well as pressing humanitarian concerns. Allowing individual States to challenge such decisions based on their incidental effects would upend the federalism and separation-of-powers principles that form the foundation of our constitutional structure.

Indeed, on the court of appeals' theory, States could interfere with the federal government's administration of the law in many other contexts as well—effectively circumventing the rule that complaints about the government's taxation of (or provision of benefits to) third parties are nonjusticiable generalized grievances. *E.g.*, *Cuno*, 547 U.S. at 342-346. Most States, for example, voluntarily incorporate the federal definition of "adjusted gross income" or "taxable income" as the basis for computing their state income taxes. Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 Duke L.J. 1267, 1269 (2013); *e.g.*, Ariz. Rev. Stat. Ann. § 43-1001(2) (2013). Likewise, most states incorporate "Federal Poverty Guidelines to determine if a defendant is 'indigent' and therefore eligible for assigned counsel." John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent*, 70 Wash. & Lee L. Rev. 1173, 1174 (2013); *e.g.*, Mont. Code Ann. § 47-1-111(3)(a) (2015). And many States (including Texas) provide subsidies to disabled veterans, and borrow the federal definitions for who qualifies as a disabled veteran. *E.g.*, Tex. Educ. Code Ann. § 54.341 (West. Supp. 2015) (free tuition); 31 Tex. Admin. Code § 59.2 (2015) (free admission to state parks); 37 Tex. Admin. Code § 15.38 (2015) (free driver's licenses). On the court of appeals' theory, any State that voluntarily adopted such a tax or subsidy tied to a federal category could sue the federal government to challenge any policy that had the incidental effect of decreasing state revenue or increasing state costs.

The court of appeals asserted that it is "speculation that a state would sue" in the myriad circumstances its holding would authorize. Pet. App. 35a. But the

very fact that respondents have sued is proof that the risk is not hypothetical. And considering immigration alone, there is every reason to think that States would seek to air their policy grievances in the federal courts. Because "[i]mmigration policy shapes the destiny of the Nation," *Arizona*, 132 S. Ct. at 2510, it is often controversial. In all events, the court of appeals' blithe reassurance that this case is a once-in-a-lifetime event effectively concedes that Article III—a limitation that "is crucial in maintaining the 'tripartite allocation of power' set forth in the Constitution," *Cuno*, 547 U.S. at 341 (citations omitted)—would be no barrier.

Respondents may have "understandable frustrations with the problems caused by illegal immigration," *Arizona*, 132 S. Ct. at 2510, and may disagree with the Guidance as a matter of law and policy, just as other States support it. But under Article III, courts are not the appropriate forums for resolving such a disagreement. Rather, the appropriate forum is the political process, "informed by searching, thoughtful, rational civic discourse." *Ibid.* This Court should not enable a faction of States to evade *Arizona* and to use the federal courts to wrest control over a sensitive and quintessentially national matter that the Constitution and INA reserve exclusively to the political Branches of the federal government.

B. Protecting A State From The Costs Of A Voluntary State-Law Subsidy For Driver's Licenses Is Not Within The "Zone Of Interests" Of Any Provision Of The INA

Even if respondents made the showing necessary for Article III standing, they would lack a cause of action under the APA. The APA does not "allow suit

by every person suffering injury in fact." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). Rather, the APA provides a cause of action only to a plaintiff "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. To be "aggrieved" in this sense, "the interest sought to be protected by the complainant [must] be arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Clarke*, 479 U.S. at 396 (brackets and citation omitted).

Respondents cannot satisfy this requirement because no relevant statute protects a State from bearing the costs of a voluntary state-law subsidy for driver's licenses. Indeed, respondents have never contended otherwise. *E.g.*, Br. in Opp. 26-27. Respondents instead have tried to satisfy the zone-of-interests test by pointing to different interests. They assert (*ibid.*) that the INA protects States by "protecting their citizens by reserving jobs for those lawfully entitled to work," and that the APA's notice-and-comment provision protects their interest in "comment[ing] on administrative decisionmaking." But a plaintiff cannot mix-and-match one interest for Article III purposes and a different interest for zone of interests. "[O]n any given claim[,] the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found.* v. *Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996); see 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.7, at 513 (3d ed. 2008) ("[T]he same interest must satisfy both tests.").

Respondents' assertion of these additional injuries also fails on its own terms. No provision of the INA departs from the well-settled rule that States cannot raise a derivative claim on behalf of their citizens against the federal government for its administration of the federal laws. See note 6, *supra*. Indeed, the citizens themselves would lack a claim under the Constitution or the INA. See *Sure-Tan*, 467 U.S. at 897; *Federation for Am. Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests a suit challenging parole of Cubans into this country, where plaintiffs relied on incidental effects of that policy on workers in Miami), cert. denied, 521 U.S. 1119 (1997). And respondents' circular notice-and-comment argument would eliminate the zone-of-interests test in every notice-and-comment case: Anybody who is willing to initiate a lawsuit could plausibly assert that he also wished to submit a comment. Not only must a party seeking to compel notice-and-comment rulemaking have Article III standing, but also it must be "aggrieved" under the "relevant statute." 5 U.S.C. 702; cf. *Lujan*, 504 U.S. at 572-573 & n.8. That means the underlying *substantive* statute: here, an operative provision of the INA. *E.g.*, *Mendoza* v. *Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014).

The court of appeals' approach to the zone-of-interests analysis also exacerbates the practical dangers of its unprecedented approach to Article III, by forcing courts to resolve disputes over immigration policy under the APA unless review is independently precluded by law. The one-two punch of these rulings thus would dramatically alter the separation of powers, and throttle the effective administration and

enforcement of the immigration laws through protracted litigation with different States or competing factions of States.

C. The Guidance Is Not Justiciable Under the APA Because It Involves Matters That Are Committed To Agency Discretion By Law

The APA precludes judicial review of certain categories of decisions that are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). The Guidance fits the bill. A decision to defer action is itself unreviewable because notifying an alien that DHS has decided to forbear from removing him for a designated period is an exercise of enforcement discretion—a matter traditionally regarded as unreviewable. Pet. App. 93a (King, J., dissenting); *id.* at 213a-214a (Higginson, J., dissenting). And Congress has enacted statutes authorizing the Secretary to decide, as a matter of discretion, whether aliens may work lawfully and in turn participate in the Social Security system (as they must do if they are to be lawfully employed). See pp. 7-8, *supra*. Those provisions furnish "no meaningful standard against which to judge the [Secretary's] exercise of discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993). And an unreviewable exercise of enforcement discretion with unreviewable consequences is unreviewable.

1. In *Heckler* v. *Chaney*, 470 U.S. 821 (1985), this Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Id.* at 832. *Heckler*'s presumption of non-reviewability applies to decisions to defer immigration enforcement action. Administrative discretion is "[a] principal feature of the removal system." *Arizona*, 132 S. Ct. at 2499. In-

deed, immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) (citation omitted). And deferred action is a "regular" and longstanding practice for exercising that discretion. *AADC*, 525 U.S. at 483-484.

The court of appeals acknowledged (Pet. App. 44a) that the Secretary has unreviewable discretion under *Heckler* to forbear from pursuing removal of every single individual who could obtain deferred action under the Guidance—and to forbear from pursuing removal of the much larger number of aliens whom the Secretary has determined are not enforcement priorities. The court nonetheless believed that *Heckler*'s presumption against review is inapplicable here, because deferred action permits an individual "to be lawfully present in the United States." *Id.* at 413a.

That fundamentally misunderstands the term "lawful presence." Insofar as deferred action itself is concerned, "lawful presence" simply describes the result of notifying an alien that DHS has made a nonbinding decision to forbear from pursuing his removal for a period of time: He may remain present in the United States without being removed, for so long as DHS continues to forbear. Pet. App. 113a-114a (King, J., dissenting). The discretion to permit an alien to be "lawfully present" in this sense is thus precisely the kind of agency judgment that is committed to DHS's discretion under *Heckler*. Indeed, respondents appear to agree that DHS has unreviewable discretion to "distribute documentation designating certain unauthorized immigrants as low-priority law enforcement

targets." Br. in Opp. 20 n.7 (brackets, citation, and internal quotation marks omitted). That describes deferred action perfectly.

Respondents insist that deferred action goes further and "purports to *alter* [INA] requirements." Br. in Opp. 20 (citation omitted; brackets in original). That is incorrect. It does not change the law in any way or create any new immigration categories. DHS can unilaterally revoke deferred action, without notice or process, and pursue removal. See pp. 4-7, *supra*. Deferred action thus "does not confer any form of legal status in this country." Pet. App. 413a; see *Chaudhry* v. *Holder*, 705 F.3d 289, 292 (7th Cir. 2013) ("[U]nlawful presence and unlawful status are distinct concepts."); 5 *Immigration Law and Procedure* § 63.10[2][c] (2014) (discussing this distinction); *e.g.*, Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1122-1133 (2015) (same). "Lawful status" (such as lawful permanent resident status) provides a legally-enforceable defense to removal under the INA. Deferred action does not. See pp. 4-7, *supra*. The label "lawful presence" does not alter this essential legal distinction.

"Lawful presence" in this sense is the result of *every* decision to accord deferred action, on any basis. See Pet. App. 413a. If that were enough to justify APA review, *Heckler* would provide little protection in the immigration context, because countenancing an individual alien's continued presence "is an inevitable element of almost any exercise of discretion in immigration enforcement." J.A. 76. Similar practices are also common outside immigration. For example, the "passive enforcement" policy in *Wayte* v. *United States*, 470 U.S. 598 (1985), countenanced an ongoing

failure by approximately 674,000 people to register for the draft. See *id.* at 600, 604 & nn.3-4. Criminal prosecutors also often send declination letters, enter into deferred-prosecution agreements, or use pretrial diversion, which similarly notify an individual of the decision to forbear. See Pet. App. 117a (King, J., dissenting). Yet the government is aware of no case relying on such attributes of prosecutorial discretion to bootstrap a challenge to the exercise of discretion itself.

2. DHS's decisions about the other attributes of deferred action—the ability to work lawfully and, in turn, to participate in Social Security—are also committed to agency discretion by law and do not render the Guidance reviewable.

At the outset, the Guidance does not change the way the law operates with respect to deferred action's consequences. For decades, aliens with deferred action have been able to apply for work authorization on the basis of economic need and, in turn, to participate in Social Security. See 46 Fed. Reg. at 25,080; 44 Fed. Reg. 10,371 (Feb. 20, 1979). That was long before this Court in 1999 described deferred action as "a regular practice," *AADC*, 525 U.S. at 483-484, and long before Congress enacted a series of statutes encouraging the Secretary to use "deferred action" for more groups of aliens. A ruling that the Guidance is reviewable because of long-established consequences that it does not alter would eviscerate *Heckler*'s protection under the INA, because the same consequences flow from countless discretionary decisions in immigration enforcement. *E.g.*, 8 C.F.R. 274a.12(a), (b), and (c) (aliens may obtain work authorization on dozens of grounds).

Furthermore, as set forth more fully below, see pp. 48-53, *infra*, Congress has long made it a component of the Secretary's enforcement discretion to decide whether to authorize the affected aliens to work. DHS and its predecessor INS have exercised that authority for more than 50 years pursuant to their authority to administer the INA, 8 U.S.C. 1103(a); it has been codified in formal regulations since 1981, 46 Fed. Reg. at 25,080; and Congress ratified that interpretation by providing that an employer may lawfully hire an alien *who is "authorized to be so employed by th[e INA] or by the [Secretary]."* 8 U.S.C. 1324a(h)(3) (emphasis added). The connection between enforcement discretion and work authorization is close and natural: Exercising discretion means that aliens will live in the United States, and "in ordinary cases [people] cannot live where they cannot work." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915).

These statutes and regulations are "completely permissive" and provide "no meaningful standards against which to judge the agency's exercise of discretion." *Perales* v. *Casillas*, 903 F.2d 1043, 1047, 1049 (5th Cir. 1990) (decisions to deny work authorization to a particular class of aliens are committed to agency discretion by law). Although Congress has imposed some limits on the Secretary's discretion to provide work authorization, *e.g.*, 8 U.S.C. 1226(a)(3) (aliens released on bond or recognizance during removal proceedings); 8 U.S.C. 1231(a)(7) (aliens released on orders of supervision after final order of removal), none applies here.

Congress has similarly granted "the [Secretary]" discretion to "determine[]" whether a non-qualified alien is "lawfully present" for purposes of participat-

ing in Social Security retirement and certain other federal earned-benefit programs. 8 U.S.C. 1611(b)(2)-(4). This provision does not limit authorization to aliens with "lawful status," and articulates no meaningful standard for judging the Secretary's decision.[8]

3. The INA's structure provides additional confirmation that the APA bars judicial review of the Guidance. When an alien receives a final removal order, the INA generally provides the alien a right of judicial review. 8 U.S.C. 1252. But the INA provides no cause of action to a State or other third party to challenge a removal order or an exercise of discretion in an alien's favor. If Congress had intended to allow suits to challenge decisions concerning deferred action or its consequences, one would expect that the parties most directly affected—aliens *denied* deferred action—would be permitted to sue. Instead, 8 U.S.C. 1252(g) squarely prohibits just that. This Court explained in *AADC* that Section 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 486 n.9; see 5 U.S.C. 701(a)(1). That is precisely what respondents seek here, and their effort should be rebuffed.

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[8] Congress has similarly committed to "the [Secretary's]" discretion the determination of whether an alien's "stay" is "authorized" for purposes of computing time towards the "unlawful presence" bars to admissibility. 8 U.S.C. 1182(a)(9)(B)(i) and (ii). That provision is also largely irrelevant here. Every individual covered by the Guidance is already removable, with or without tolling. Accrual and tolling have no impact unless an individual departs the country. *Ibid.* And tolling is entirely irrelevant for virtually all parents under DAPA because they are adults who stayed in the United States for a year without authorization, and hence face the maximum ten-year barrier if they depart. *Ibid.*; see Pet. App. 44a n.99.

II. THE GUIDANCE IS A LAWFUL EXERCISE OF THE SECRETARY'S BROAD STATUTORY AUTHORITY TO ADMINISTER AND ENFORCE THE INA

The Guidance is a lawful, responsible exercise of the Secretary's broad statutory authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), and to carry out the "administration and enforcement of th[e INA] and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. 1103(a), including by authorizing aliens to be lawfully employed, 8 U.S.C. 1324a(h)(3); 8 C.F.R. 274a.12(c)(14). The Guidance is carefully designed to employ enforcement discretion, in the form of deferred action and concomitant work authorization, to address a difficult National problem involving severe resource constraints and significant humanitarian and policy concerns.

Although DHS fully uses available appropriations to remove hundreds of thousands of aliens annually, the fact remains that millions of undocumented aliens will continue living and working here. Rather than ignoring that reality, the Guidance addresses it forthrightly by using deferred action for two categories of aliens with particularly strong ties to this country and who are particularly unlikely to leave voluntarily: Parents of U.S. citizens or lawful permanent residents, and people who came here as children, many of whom have never known another home. Deferred action does not provide these individuals with any lawful status under the immigration laws. But it provides some measure of dignity and decent treatment, and addresses some of the pressing policy consequences that their presence generates. It recognizes the damage that would be wreaked by tearing apart

families, and it allows individuals to leave the shadow economy and work on the books to provide for their families, thereby reducing exploitation and distortion in our labor markets.

Long settled practice under the immigration laws underscores that the Guidance is a lawful exercise of the Secretary's broad discretion. That history confirms that discretion, of necessity, is a principal feature of the administration and enforcement of the INA; that responsible Executive officials have regularly exercised that discretion by issuing policies for deferring action (or exercising similar forms of discretion) on the basis of aliens' membership in defined categories; that work authorization has consistently been tied to such exercises of discretion; and that Congress has long been aware of these practices and has repeatedly responded by affirming the Secretary's authority with respect to both enforcement discretion and work authorization, while at the same time directing DHS to focus its limited enforcement resources on securing the border and removing serious criminals. This dialogue between the political Branches reflects the ongoing push and pull over the Nation's immigration policies by those who are democratically responsible for formulating and implementing them. And the Secretary's longstanding interpretation of the INA as authorizing these practices is entitled to great deference. See *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

A. The Guidance Is A Lawful And Responsible Exercise Of The Secretary's Broad Authority Under The INA

The Guidance is a vital part of the Secretary's responsible exercise of the authority the INA vests in

him. Enforcement discretion is classically exercised to consider "whether agency resources are best spent on this violation or another," whether a particular action "best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. The level of congressional appropriations for DHS's enforcement operations means, by necessity, that Congress has accorded the Secretary "tremendous authority" to decide which aliens will actually be the subject of enforcement—and, as a corollary, to decide which aliens will not. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009); see *id.* at 510–511. In particular, the scope of enforcement funded by current appropriations ensures that millions of aliens who have lived and worked in this country for years are going to continue living and working here for the foreseeable future.

The Secretary responded to this reality by issuing two interrelated memoranda. First, consistent with Congress's statutory directions, see pp. 3-4, *supra*, his priorities memorandum focuses enforcement resources "to the greatest degree possible" on removing serious criminals, terrorists, aliens who are apprehended at or have recently crossed the border, and aliens who have significantly abused the immigration system. Pet. App. 426a; *id.* at 420a-429a. Second, the Guidance complements those priorities by establishing a process for according deferred action to some non-priority aliens in order to focus more resources on removing criminal aliens and others who are priorities. See *Arpaio* v. *Obama*, 797 F.3d 11, 24 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 900 (2016).

Under the Guidance, individual non-priority aliens can come forward, identify themselves, pay a fee to defray expenses, pass a background check, and potentially receive deferred action. Pet. App. 417a. If law-enforcement officials later encounter such an individual, ICE can "quickly confirm the alien's identity through a biometric match" and confirm that he or she does not warrant the commitment of resources for removal. D. Ct. Doc. 150-1 ¶ 15 (Feb. 23, 2015); see *id.* ¶¶ 14-17. Without the Guidance, ICE would have to check that individual's background and immigration history every time—and ICE would foot the bill. See *id.* ¶¶ 14-17; D. Ct. Doc. 150-2 ¶¶ 7-13 (Feb. 23, 2015).

In addition to facilitating DHS's ability to focus on enforcement priorities, the Guidance also takes into account the weighty humanitarian and policy considerations produced by the inescapable fact that millions of aliens will remain in this country. This Court has emphasized that, when exercising its discretion, DHS appropriately considers "whether [an] alien has children born in the United States [or] long ties to the community." *Arizona*, 132 S. Ct. at 2499. The Guidance does just that. Every person under the Guidance has "long ties to the community," *ibid.*, because it only reaches people who have lived in this country continuously since January 1, 2010, or earlier. Pet. App. 416a-417a. Both the original (unchallenged) 2012 DACA policy, and the DACA policy as expanded by the Guidance, reach only people with particularly strong ties to this country: people who came here as children, many of whom have never known another home. *Ibid.* These individuals are removable, but "fundamental conceptions of justice" confirm that people who came to this country as children are not

similarly situated to adults. *Plyler*, 457 U.S. at 220; cf. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732-734 (2016). The INA itself recognizes this principle, as time when an alien is a minor "shall [not] be taken into account" when calculating periods of "unlawful presence." 8 U.S.C. 1182(a)(9)(B)(iii)(I).

The DAPA policy set forth in the Guidance reaches a group that is compelling for different reasons: parents of U.S. citizens or lawful permanent residents. Pet. App. 417a. Again, the INA embodies the significance of this parent-child relationship. Parents of U.S. citizens qualify for "immediate relative" visas—the "most favored" visa category, *Cuellar de Osorio*, 134 S. Ct. at 2197 (opinion of Kagan, J.)—as soon as their child turns 21. 8 U.S.C. 1151(b)(2)(A)(i). And parents of lawful permanent residents obtain the same treatment once their child becomes a U.S. citizen, which ordinarily may occur after five years or less. See 8 U.S.C. 1427(a). An immigration judge also may grant lawful permanent residence through "[c]ancellation of removal," under certain circumstances, because of the impact of removing an alien parent on a U.S.-citizen or lawful permanent resident child. 8 U.S.C. 1229b(b)(1)(D); see 8 U.S.C. 1182(a)(3)(D)(iv), (g)(1)(B), (h)(1)(B), and (i)(1), 1227(a)(1)(H). Deferred action will give these parents the dignity of coming forward and "be[ing] counted," and their families some limited measure of relief from fear that they will be broken up. Pet. App. 415a.

The Guidance also promotes self-sufficiency and helps protect American workers, see 8 U.S.C. 1324a, 1601, through deferred action's longstanding tie to work authorization for aliens with economic need, 8 C.F.R. 274a.12(c)(14). With or without the Guidance,

most of the covered individuals will continue living and working here. See Pet. App. 415a. But without the Guidance, many would work off-the-books, exposing themselves to exploitation while putting American workers and scrupulous employers at a competitive disadvantage. Deferred action and work authorization will "encourage these people to come out of the shadows," work on the books at higher wages, and pay taxes on those higher wages. *Ibid.* That in turn will make those individuals more self-reliant, less dependent on social services, and increase federal and state tax revenues. See States of Wash. et al. Amicus Br. 3-8; see also Cong. Budget Office, *Budgetary Effects of Immigration-Related Provisions of the House-Passed Version of H.R. 240, An Act Making Appropriations for the Department of Homeland Security* 1-8 (Jan. 29, 2015) (estimating that blocking the Guidance would cost the federal government $7.5 billion from 2015-2025).

The Guidance also guards against perverse incentives. To avoid encouraging further migration, it covers only people who have already lived here since 2010—and it helps DHS focus more resources on border enforcement. Pet. App. 416a-417a. DAPA also applies only to people who, by November 20, 2014, are already parents of U.S. citizens or lawful permanent residents. *Id.* at 417a. So individuals cannot become eligible by having children now.

In sum, the Guidance is a policy for responsibly exercising enforcement discretion, under the INA, to address a difficult real-world problem within the Secretary's purview.

B. The History Of Immigration Law Confirms That The Guidance Is A Lawful Exercise Of The Secretary's Authority Under The INA

Current immigration law "is the product of a long history," 1 *Immigration Law and Procedure* § 2.01 (2015), which confirms that the Guidance is within the Secretary's authority. For more than 50 years, the INS and DHS have issued policies for conferring deferred action (or other similar discretionary practices) for aliens living in the United States without lawful status, and doing so on the basis of defined categories targeting large groups—including the 1990 Family Fairness policy targeting approximately 40% of the estimated undocumented population at the time. And these policies have consistently resulted in work authorization. In response, Congress has repeatedly ratified the Secretary's authority to exercise discretion in this way. Respondents' challenge to the Guidance cannot be reconciled with this history.

1. Past policies for exercising enforcement discretion

Since 1960, the INS and DHS have established more than 20 policies for using deferred action (or functionally similar forms of enforcement discretion) for large numbers of aliens who were living in the United States without lawful status, and doing so based on their membership in defined categories. See *EVD Report* 6 (collecting examples); J.A. 209-212 (same). From 1960 to 1990, the INS adopted a string of policies for according "extended voluntary departure" to aliens living in the United States, based solely on their nationality. *Ibid.* Extended voluntary departure permitted "otherwise deportable aliens to remain temporarily in the United States," as a matter of dis-

cretion, "out of concern that the forced repatriation of these individuals could endanger their lives or safety." *EVD Report* 6; see *Hotel & Rest. Emps. Union* v. *Smith*, 846 F.2d 1499, 1501 (D.C. Cir. 1988) (en banc) (per curiam) (Mikva, J.); *Smith*, 846 F.2d at 1519 (Silberman, J.) ("extrastatutory decision to withhold enforcement" as a matter of discretion). For example, a 1960 policy applied to Cuban nationals; 1975 policies reached Vietnamese, Cambodians, and Laotians; and a 1987 policy reached between 150,000 and 200,000 Nicaraguans during unrest. *EVD Report* 6; J.A. 210.[9]

The INS and DHS have also established many such policies with categories defined based on factors in addition to (or different from) nationality. For example, in the 1970s, the INS accorded extended voluntary departure to approximately 250,000 foreign nationals from the Western Hemisphere who were already living here. J.A. 209. The INS's "Family Fairness" policy, adopted in 1987 and expanded in 1990, invoked indefinite voluntary departure as a means to exercise discretion for as many as 1.5 million unauthorized aliens because they were ineligible spouses or children of certain aliens granted lawful status. J.A. 210-211; see p. 56, *infra*. Policies in 1989 and 1990

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[9] In 1990, Congress codified the nationality-based practice with a "more formal and orderly mechanism," known as "[t]emporary protected status." 8 U.S.C. 1254a (Supp. II 1990); *EVD Report* 4. Extended voluntary departure has not been used since then. See J.A. 211-212. Congress did not constrain the Secretary's ability to exercise discretion on additional or other grounds, however. Upon signing the act, the President stated that he did not interpret it to do so and that "[a]ny attempt" to displace that authority "would raise serious constitutional questions." President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990).

after the Tiananmen Square protests invoked "deferred enforced departure" for certain Chinese nationals (approximately 80,000 individuals); a 1992 policy covered certain Salvadorans (approximately 190,000); a 1997 policy covered certain Haitians (approximately 40,000); and policies in 1999, 2007, 2011, and 2014 have covered certain Liberians. J.A. 210-212; see Memorandum from President Barack Obama, to Sec'y of Homeland Security, *Deferred Enforced Departure for Liberians* (Sept. 26, 2014).[10]

Since 1997, DHS has used deferred-action policies for battered spouses and victims of human trafficking; foreign students displaced by Hurricane Katrina; widows and widowers of U.S. citizens; and, under DACA, individuals who came to the United States as children and have long made this country their home. See pp. 5-7, *supra*. And Congress has enacted a series of statutes recognizing that the Secretary may accord "deferred action" for aliens in defined categories, and encouraged him to do so more often. *Ibid.*

2. Work authorization as a component of the exercise of discretion

Crucially, INS and DHS have authorized lawful work by aliens who remain in the United States under every deferred-action or similar policy since at least the early 1970s. The INS and DHS have long interpreted their broad authority to administer the immigration laws, 8 U.S.C. 1103(a), to encompass the ability to authorize aliens to work as an exercise of discre-

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[10] "Deferred enforced departure" is similar to extended voluntary departure and, since 1990, has been directed only by the President. See 8 C.F.R. 274a.12(a)(11); 75 Fed. Reg. 33,457 (June 11, 2010).

tion. *E.g.*, 17 Fed. Reg. 11,489 (Dec. 19, 1952) (8 C.F.R. 214.2(c)) (authorizing nonimmigrants to engage in employment if "authorized by the district director or the officer in charge having administrative jurisdiction over the alien's place of temporary residence"). This Court "will normally accord particular deference" where the agency interpretation in question is "of 'longstanding' duration." *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002) (citation omitted).

By the early 1970s, the INS's ordinary practice was to authorize "illegal aliens" to work when it decided not to pursue deportation—including aliens with "extended voluntary departure" or "whose departure or deportation will not be enforced." Sam Bernsen, INS Gen. Counsel, *Leave to Labor*, 52 No. 35 Interpreter Releases 291, 294 (Sept. 2, 1975); see Sam Bernsen, INS Assistant Comm'r, *Lawful Work for Nonimmigrants*, 48 No. 21 Interpreter Releases 168, 315 (June 21, 1971). To do so, the INS would stamp an immigration form (the I-94) with "Employment Authorized." *Ibid.* At the time, there was no general federal prohibition against hiring unauthorized aliens. See *De Canas* v. *Bica*, 424 U.S. 351, 360-361 (1976). But "[s]ome employers [would] not hire an alien" without "some evidence of authorization to work, and the Social Security Administration [would] not issue a social security card without evidence of work authorization." *Leave to Labor* 294; see 44 Fed. Reg. at 10,371 (Social Security cards issued to aliens with I-94 indicating work authorization).[11] The INS granted work authorization as a component of its exercise of discretion, reasoning that "in such cases gainful employment

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[11] At the time, aliens were barred from receiving Social Security benefits only if they resided abroad. See 42 U.S.C. 402(t) (1970).

should not be prevented and that it is reasonable to give the alien something that he can present to a prospective employer to show that he can work." *Leave to Labor* 294; see *De Canas*, 424 U.S. at 364-365 (discussing INS issuance of work authorization and State concession that it could not bar employment by aliens with such authorization).

In 1974, Congress ratified the INS's position that it had discretion under the INA to authorize aliens to work. The Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-519, 88 Stat. 1652, made it unlawful for farm labor contractors to knowingly employ any "alien not lawfully admitted for permanent residence or who has not been authorized *by the Attorney General* to accept employment." 7 U.S.C. 2045(f) (Supp. IV 1974) (emphasis added); see 7 U.S.C. 2044(b) (1970 & Supp. IV 1974) (license could be revoked on same basis). The clear premise was that "the Attorney General" was already empowered to "authorize[]" aliens "to accept employment." *Ibid.*; see 41 Fed. Reg. 26,825-26,826 (June 29, 1976) (INS Form I-94 designated "H-2" or stamped "Employment Authorized" showed work authorization).[12]

In 1981, the INS promulgated formal regulations codifying its existing practices. 46 Fed. Reg. at 25,080-25,081; see 44 Fed. Reg. 43,480 (July 25, 1979). The INS relied on its general authority to administer the INA under Section 1103(a). See *ibid.*; see also 46

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[12] In 1983, Congress replaced this provision with a similar scheme that prohibited farm-labor contractors from knowingly employing "an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 106(a), 96 Stat. 2589-2590.

Fed. Reg. at 25,080 ("[E]mployment authorization is a matter of administrative discretion because humanitarian or economic needs warrant administrative action."). From the start, those regulations enabled aliens to work notwithstanding that they lacked lawful immigration status: Aliens with deferred action were covered, as well as any aliens who merely applied for adjustment of status. 46 Fed. Reg. at 25,081. Aliens with extended voluntary departure were added shortly thereafter. 46 Fed. Reg. 55,920-55,921 (Nov. 13, 1981). These regulations thus embody the INS's longstanding interpretation that, as a component of the exercise of discretion, the INA empowers it to authorize lawful work by aliens who lack lawful status.

3. IRCA

In the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, Congress adopted a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002). IRCA extended to all employers the sanctions regime that had previously applied only to farm-labor contractors. See § 101(b)(1)(C) and (D), 100 Stat. 3372. IRCA's key provision makes it unlawful for an employer to hire "an unauthorized alien (*as defined in subsection (h)(3)* of this section) with respect to such employment." 8 U.S.C. 1324a(a)(1) (emphasis added). Subsection (h)(3) in turn defines "unauthorized alien" as an alien who is not a lawful permanent resident and not "authorized to be so employed by th[e INA] *or by the Attorney General*." 8 U.S.C. 1324a(h)(3) (emphasis added). When read "[a]gainst th[e] background understanding in the legal and regulatory system," including experience under

the agriculture-specific regime IRCA supplanted, IRCA is "convincing support for the conclusion that Congress accepted and ratified" the INS's preexisting understanding that it could authorize aliens to work as an integral component of the exercise of discretion in administering and enforcing the INA. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

The INS formally adopted this straightforward interpretation of IRCA shortly after it became law. An administrative challenge had been filed arguing that the INS's work-authorization regulations were *ultra vires*. See 51 Fed. Reg. 39,385-39,386 (Oct. 28, 1986). In the wake of IRCA, the principal challenger submitted a comment interpreting Section 1324a(h)(3) to mean that the Attorney General lacked authority "to grant work authorization except to those aliens who have already been granted specific authorization by the [INA]." 52 Fed. Reg. 46,093 (Dec. 4, 1987). The INS rejected that view. "[T]he only logical way to interpret" the phrase "authorized to be so employed by th[e INA] or by the Attorney General," the INS explained, "is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute." *Ibid.* (citation omitted). The INS recodified its work-authorization regulations—including for aliens with deferred action—identifying Sections 1103(a) *and* 1324a as authority. See 52 Fed. Reg. at 16,221, 16,228.

The limitations period for challenging those regulations expired decades ago. See 28 U.S.C. 2401(a). DHS's longstanding interpretation of its authority to authorize aliens to work—codified both before and after IRCA—warrants full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

4. The Family Fairness policy and the IMMACT

Legislation and administrative practice since IRCA further confirms that the Guidance is a valid deferred-action policy. In IRCA, Congress granted lawful status to millions of undocumented aliens who applied and satisfied certain residency and other requirements. *E.g.*, 8 U.S.C. 1255a(a) and (b). This enabled them to obtain temporary resident status with work authorization, and eventually permanent resident status and naturalization. *Ibid.*; see 8 U.S.C. 1427(a). But Congress pointedly decided *not* to extend legal protection to those aliens' spouses and children who had arrived too recently or were otherwise ineligible. See S. Rep. No. 132, 99th Cong., 1st Sess. 16 (1985) ("It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization.").

In October 1987, the INS Commissioner established a "Family Fairness" policy to provide more modest relief, through enforcement discretion, to some members of that same group. See *Recent Developments*, 64 No. 41 Interpreter Releases 1190, App. I, at 1203-1204 (Oct. 26, 1987). The INS announced that it would "indefinitely defer deportation" for (1) ineligible spouses and children who could show compelling or humanitarian factors; and (2) ineligible unmarried minor children who could show that both

parents (or their only parent) had achieved lawful temporary resident status. *Ibid.* Those individuals also could obtain work authorization. *Id.* App. II, at 1206.

In 1990, the INS expanded the Family Fairness policy dramatically. As expanded, it provided indefinite voluntary departure for any ineligible spouse or minor child of a legalizing alien who showed that he or she (1) had been residing in the country by the date of IRCA's 1986 enactment; (2) was otherwise inadmissible; (3) had not been convicted of a felony or three misdemeanors; and (4) had not assisted in persecution. J.A. 213-215. The Commissioner explained that "we can enforce the law humanely," and that "[t]o split families encourages further violations of the law as they reunite." *Recent Developments*, 67 No. 6 Interpreter Releases 153, 154 (Feb. 5, 1990). The policy stated that "[w]ork authorization will be granted" to aliens who qualified. J.A. 215.

The INS could only estimate how many people were potentially eligible and how many would actually come forward, but on any estimate the numbers were large. *E.g.*, *Recent Developments*, 67 No. 8 Interpreter Releases 201, 206 (Feb. 26, 1990).[13] The INS Commissioner testified that 1.5 million people were estimated to be eligible. *Immigration Act of 1989: Hear-*

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[13] *E.g.*, 55 Fed. Reg. 6058 (Feb. 21, 1990) (anticipating requests from "approximately one million" people); J.A. 646 (internal INS memorandum estimating "greater than one million" people "will file"); J.A. 642 ("potentially millions"); see 67 No. 8 Interpreter Releases 206 ("no more than 250,000"); Tim Schreiner, *INS Reverses Policy That Split Alien Families*, S.F. Chron., Feb. 3, 1990, at A15 ("more than 100,000 people" estimated to file); see also Paul Anderson, *New Policy on Illegal Immigrants*, Phila. Inquirer, Feb. 3, 1990, at A10 (it "may run to a million").

ings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 2d Sess. Pt. 2, at 49, 56 (1990). The estimated undocumented population in 1990 was 3.5 million. Office of Policy & Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, at 10 (2003).

Congress responded by ratifying the Family Fairness program and by providing for an even broader group to obtain lawful status beginning one year thereafter. Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, Tit. III, § 301(g), 104 Stat. 5030. Congress stated that this one-year delay "shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Ibid.*

The IMMACT simultaneously made several amendments to IRCA's key provision on work authorization, 8 U.S.C. 1324a. Tit. V, §§ 521(a), 538, 104 Stat. 5053, 5056. But Congress did not modify the provision recognizing that "the Attorney General" could "authorize[]" aliens to be lawfully employed—even in response to the INS's policy that could have extended work authorization to a large proportion of the total undocumented population. 8 U.S.C. 1324a(h)(3). It is well-settled that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013) (citation omitted).

5. Deferred-action statutes

Since the IMMACT, Congress has enacted a series of statutes acknowledging DHS's authority to defer action and authorize work for aliens in defined categories. For example, in the REAL ID Act of 2005, Congress permitted participating States to issue driver's licenses to aliens with "approved deferred action status." 49 U.S.C. 30301 note. In 2000, Congress similarly made two additional categories of aliens eligible for deferred action. See Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, Tit. V, § 1503(d)(2)(D)(i)(II) and (IV), 114 Stat. 1522. Those statutes did not purport to create, define, or constrain the category of "deferred action." Rather, they *presuppose* existing authority for deferred action and (in the VTVPA) direct that the Secretary consider exercising that preexisting authority in the identified types of cases. See USA PATRIOT Act § 423(b), 115 Stat. 361 (certain aliens "may be eligible for deferred action and work authorization").

A similar ratification occurred in 2008. In 2001, the INS had instituted a policy to use "[e]xisting authority," including "deferred action," to forbear from removing individual aliens who could make a bona fide showing of eligibility for nonimmigrant T and U visas under 8 U.S.C. 1101(a)(15)(T) and (U) as victims of human trafficking and other crimes, but who did not have any lawful status. J.A. 232. In 2008, Congress ratified (and expanded) that policy. See 8 U.S.C. 1227(d)(1). Congress authorized DHS to grant administrative stays of removal to aliens covered by this same policy, and further provided that the denial of a request for a stay would not "preclude the alien from

applying for * * * deferred action." 8 U.S.C. 1227(d)(2).

These statutes powerfully support the Guidance. Congress's decisions to encourage the Secretary to accord "deferred action" for more categories of aliens, to validate under federal law the issuance of driver's licenses to aliens with deferred action, and to ratify an existing deferred-action policy targeting a defined category, "highlight Congress's continued acceptance" of this "flexible and discretionary" practice. Pet. App. 150a (King, J., dissenting).

6. The DREAM Act, DACA, and DAPA

In 2012, following Congress's failure to enact the DREAM Act of 2010, H.R. 5281, 111th Cong., 2d Sess. (2010), which would have created a lawful status for undocumented aliens who came here as children, *ibid.*, DHS announced the original DACA policy. DACA did not confer lawful status, but instead took the familiar and more modest course of deferring enforcement action for such aliens, as a matter of discretion, with concomitant work authorization. See J.A. 102-106. An estimated 1.4 million aliens were eligible under this policy. J.A. 176-177. DHS reports that, through September 2015, more than 836,000 initial requests were received, of which 787,855 were accepted and 699,832 were granted. USCIS, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics, and Case Status: 2012-2015* (Sept. 30, 2015). This suit does not challenge the original DACA policy. See *Crane* v. *Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (dismissing Mississippi challenge to that policy for lack of standing).

Congress has considered a series of bills that would bar implementation of DACA (and later DAPA) or block funding unless they are rescinded, and that would limit the Secretary's authority to grant work authorization. *E.g.*, H.R. 5759, 113th Cong., 2d. Sess. (2014). None has passed both the House and Senate, much less become law. After much debate, Congress instead has enacted two appropriations bills that fund DHS—leaving DACA and DHS's deferred action and work-authorization authority untouched. 2016 Appropriations Act 256; 2015 Appropriations Act, 129 Stat. 42.

In sum, decades of law, practice and dialogue between the Executive and Congress confirm that the Guidance is lawful. It is no different in kind from more than 20 policies issued over the last 50 years, targeting large groups of aliens; this kind of exercise of enforcement discretion has been tied to work authorization since at least the early 1970s; formal regulations have embodied that practice since 1981; Congress has ratified DHS's longstanding view that it can exercise discretion via deferred action, and can authorize aliens to work lawfully; and Congress has encouraged the Secretary to accord deferred action for more categories of aliens, validated the issuance of driver's licenses to aliens with deferred action, and ratified an existing deferred-action policy targeting a defined category.

C. Respondents' Counterarguments Lack Merit

Respondents argue (Br. in Opp. 31-37) that the Guidance is unlawful because, in their view, (1) the Secretary lacks statutory authority to accord deferred action for any category of aliens not specifically identified as eligible in the INA itself; and (2) the poten-

tially eligible population under the Guidance is simply too large to be permitted absent congressional authority. As the lengthy historical discussion shows, however, these arguments dramatically understate the scope of authority the INA confers.

1. The court of appeals held (Pet. App. 70a-71a) that Congress had "directly addressed the precise question" here and foreclosed DHS from adopting a deferred-action policy for the categories of aliens eligible under the Guidance. The court did not, however, identify any express statutory provision barring DHS from exercising its discretion in this manner. Instead, the court inferred such a bar from the fact that the INA expressly identifies certain categories of aliens as eligible for deferred action, but does not include children who arrived here as minors or parents of U.S. citizens or lawful permanent residents. See *id.* at 71a-72a.

That is an untenable reading of the INA. Deferred action and similar discretionary practices that DHS and the INS before it have repeatedly followed do not have their source in pinpoint grants of authority by Congress. They have always been, and have always been understood to be, exercises of the general vesting power that Congress bestowed in Section 1103—as the history recounted above conclusively establishes. The statutes to which the court of appeals pointed do not create authority to use deferred action; they presuppose its existence and instruct DHS to consider the specified aliens as eligible for that form of discretion.

The court of appeals purported (Pet. App. 71a-74a) to find confirmation of its atextual and ahistorical reading of the INA in the fact that parents of U.S.

citizens or lawful permanent residents would obtain deferred action under the Guidance without having to meet the INA's more stringent requirements for obtaining lawful permanent resident status through cancellation of removal or by adjusting status. See 8 U.S.C. 1229b, 1255. But that reasoning is fundamentally flawed. Those statutory provisions are categorically different because they confer *lawful status* and do not merely defer enforcement: Aliens who receive *cancellation* of removal or otherwise become lawful *permanent* residents are no longer removable. *Ibid.* By contrast, the Guidance does not create a new lawful status; it involves an exercise of discretion to forbear from enforcement against an alien who remains removable. See pp. 37-39, *supra*. That exercise of discretion is perfectly consistent with the INA. Indeed, the INA's family-unity provisions support the DAPA policy because it covers people who will become "immediate relatives" when their children become adult U.S. citizens. See p. 46, *supra*.

2. Echoing the court of appeals, respondents insist (Br. in Opp. 32) that the number of aliens who are potentially eligible under the Guidance is simply too large to be justified under existing statutory authority. DAPA could reach approximately four million parents, Pet. App. 5a-6a, which is larger than the potentially eligible group under any prior similar policy, J.A. 95-97. (The number of people who would actually request or obtain deferred action is unknown.) But respondents do not dispute that the Secretary has discretion to establish policies for forbearing from removing every single person who is potentially eligible under the Guidance—and indeed for forbearing from removing the larger number of

aliens who he has determined are not enforcement priorities. *E.g.*, Pet. App. 44a. The Secretary thus has ample authority to notify these lowest-priority aliens that he has made a non-binding decision not to remove them for a period of time.

The real focus of respondents' legal objection is not deferred action itself, but the availability of work authorization as a result. They assert (Br. in Opp. 24-25) that Section 1324a(h)(3) cannot justify work authorization on this scale, because it is a mere "definitional provision." But respondents focus on the wrong provision. Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a), the vesting clause that gives the Secretary sweeping authority to administer the INA and to exercise discretion in numerous respects. Section 1324a(h)(3) was enacted decades later. It both ratifies and independently supports the Secretary's longstanding position that he can "authorize[]" aliens to be lawfully employed as a component of the exercise of his discretion. 8 U.S.C. 1324a(h)(3); see 52 Fed. Reg. at 46,093 (formally adopting that interpretation of Section 1324a(h)(3)).

The number of people who could obtain work authorization because of the Guidance is also not disproportionate to past exercises of the same authority. Many aliens may obtain work authorization as a matter of the Secretary's discretion, without specific statutory authorization, including via 8 C.F.R. 274a.12(a)(6), (9), (11), (c)(3), (5)-(7), (9)-(11), (14), (16)-(17), (21), and (25). DHS reports indicate that, from 2008 through 2014, it granted nearly 5.5 million initial applications and renewals for work authorization to aliens in these categories, averaging approximately

750,000 per year. USCIS, *I-765 Approvals, Denials, Pending by Class Preference and Reason for Filing* (Feb. 6, 2015).[14] Many of these aliens lack lawful status, *e.g.*, 8 C.F.R. 274a.12(a)(11) (aliens with deferred enforced departure); 8 C.F.R. 274a.12(c)(9) (applicants for adjustment of status), and may indeed be in removal proceedings, *e.g.*, 8 C.F.R. 274a.12(c)(10) (applicants for cancellation of removal).

Notably, at least since the early 1970s, every policy similar to the Guidance has made aliens eligible for work authorization. See pp. 48-53, *supra*. The Nicaraguans, Chinese, and Salvadorans who were afforded discretionary relief by the tens or hundreds of thousands were eligible for work authorization. *Ibid.* The 1990 Family Fairness policy—adopted shortly after Congress enacted IRCA—led to work authorization and targeted as many as 1.5 million people, about 40% of the undocumented population at the time. See pp. 55-57, *supra*. Notably, Congress responded by enacting a statutory program with broader relief, while endorsing that policy's ongoing operation for a year. *Ibid.* And although Congress at that time made other changes to Section 1324a, Congress has never changed its provision that "the Attorney General" may "authoriz[e]" aliens to be lawfully employed. *Ibid.* Respondents are unable to explain how those prior grants of work authorization were lawful, despite their considerable scope, while those under the Guidance are not.

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[14] Eligibility codes correspond to sections of 8 C.F.R. 274a.12.

III. THE GUIDANCE IS EXEMPT FROM NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

A. The Guidance Is A General Statement Of Policy Concerning How DHS Will Exercise Its Discretion To Defer Action

The Guidance is exempt from the APA's notice-and-comment requirements because it is a general statement of policy regarding how DHS will exercise its enforcement discretion under the INA. The APA generally requires an agency to follow notice-and-comment procedures before promulgating rules. 5 U.S.C. 553(b) and (c); *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). But the APA exempts "general statements of policy" from that requirement unless another statute provides otherwise, 5 U.S.C. 553(b)(3)(A), and none does here.

1. General statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Vigil*, 508 U.S. at 197 (quoting Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)). By contrast, legislative rules adopted through notice-and-comment procedures have the force and effect of law, and thus create legally-enforceable rights or obligations in regulated parties. *Perez*, 135 S. Ct. at 1203; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979); *Morton* v. *Ruiz*, 415 U.S. 199, 232, 236 (1974). The APA leaves to the agency the choice of which mode to employ. See 5 U.S.C. 553(b); cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). If an agency chooses to issue a statement of policy rather than a legislative rule through notice-and-comment rulemaking, that choice has consequences: the agency's statements in the policy have "no binding

effect on members of the public or on courts." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.3, at 419 (5th ed. 2010) (Pierce).

The quintessential use of policy statements is for an agency to announce how and when it will pursue (or forbear from) enforcement, in the exercise of its discretion. Like the statement of policy for the allocation of a lump-sum appropriation in *Vigil*, such enforcement policies explain how the agency intends to exercise a power that is "generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831. Unlike legislative rules adopted after notice-and-comment, such enforcement policies do not establish or alter any legally-enforceable rights or obligations of third parties. And such policies can be readily changed, in response to changing circumstances, funding, and priorities.

In light of these principles, the Guidance is exempt from notice-and-comment requirements. Like every deferred-action or similar policy DHS or the INS has ever issued, the Secretary issued the Guidance as a statement of policy without following notice-and-comment procedures. Pet. App. 411a-412a. Its text reinforces the point again and again. It is a "memorandum." *Ibid.* It states that it "is intended to reflect new *policies* for the use of deferred action" and "is an exercise of th[e] authority" to "set forth *policy* for the exercise of prosecutorial discretion and deferred action within the framework of existing law." *Id.* at 412a, 419a (emphases added). It explains that "[d]eferred action is a form of prosecutorial discretion" and it "confers no substantive right," "does not confer any form of legal status in this country, much less citizenship," and "may be terminated at any time

at the agency's discretion." *Id.* at 413a, 419a. And no alien has an enforceable right to obtain deferred action under this or any other policy. See 8 U.S.C. 1252(g); *AADC*, 525 U.S. at 485.

The Secretary remains free to modify or revoke the Guidance, in his discretion; to establish (or revoke) other deferred-action policies, in his discretion; to grant (or deny) deferred action as to any individual under this policy, other policies, or under no policy at all, in his discretion; to revoke a grant of deferred action, in his discretion; and to pursue removal, in his discretion. The Guidance thus does not bind regulated parties or the courts in any way.[15]

2. Nor does the Guidance change the consequences of deferred action, so it is not a policy regarding them. But even if it were appropriate to look past deferred action itself, those consequences—including work authorization—also are aspects of the Secretary's discretionary authority under the INA. Accordingly, the Secretary may use statements of policy to "advise the public prospectively of the manner in which [DHS] proposes to exercise [its] discretionary power" with respect to those consequences. *Vigil*, 508 U.S. at 197 (citations omitted). The INS issued statements of policy concerning work authorization for years before codifying its existing practices into regulations. See pp. 50-53, *supra*. And DHS has issued many statements of policy concerning deferred action and similar

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[15] Furthermore, deferred action involves forbearance and thus is inherently non-coercive, and the Guidance does not announce any new norm for primary conduct. The criteria are backward-looking and immutable (*e.g.*, the alien must have entered the country by January 1, 2010), or mirror preexisting legal norms (*e.g.*, not to commit crimes). Pet. App. 417a.

forms of discretion that resulted in work authorization. *Ibid.* Not one was adopted through notice-and-comment procedures.

In any event, the rule that individuals with deferred action may request work authorization based on economic need has *already* been adopted through notice-and-comment rulemaking. The INS followed notice-and-comment procedures in 1981 when first promulgating those regulations, 46 Fed. Reg. at 25,080, and did so again after Congress enacted IRCA, 52 Fed. Reg. at 16,228. The rules that lift the barrier for a non-qualified alien to participate in Social Security retirement and disability (and Medicare) have similarly been issued through notice-and-comment rulemaking. See 76 Fed. Reg. 53,764 (Aug. 29, 2011); 61 Fed. Reg. 47,039 (Sept. 6, 1996); see also 80 Fed. Reg. 7912 (Feb. 12, 2015).[16]

B. The Guidance Is Not Impermissibly "Binding"

The court of appeals held (Pet. App. 53a-69a) that notice-and-comment procedures were required because the Guidance supposedly denies individual DHS agents the leeway to *reject* deferred action for case-specific reasons when the stated criteria are satisfied. *Id.* at 64a. That contention is legally irrelevant, and at best premature.

1. Congress has vested *the Secretary himself* with discretion to administer the INA, including its remov-

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[16] Notice-and-comment procedures were unnecessary for DHS's policy that deferred action tolls the accrual of "unlawful presence." See note 3, *supra*. That policy interprets 8 U.S.C. 1182(a)(9)(B), does not bind any regulated party or court in any way, and merely addresses DHS's internal computation of time. That policy is also largely irrelevant here. See note 8, *supra*.

al provisions, see 8 U.S.C. 1103(a), and to "[e]stablish[] national immigration enforcement policies," 6 U.S.C. 202(5). Subordinate DHS agents exercise only the authority the Secretary has delegated to them. See 8 U.S.C. 1103(a)(5); 8 C.F.R. 2.1. The Secretary's choice to define criteria for deferring action thus itself reflects his exercise of the discretion that the INA vests in him.

Under the APA, it is irrelevant whether a statement of policy regarding the exercise of enforcement discretion also allows rank-and-file agents to be more aggressive in enforcement for case-specific reasons. A blanket policy is still a "policy." See *Black's Law Dictionary* 1345 (10th ed. 2014) ("[P]olicy" means "[a] standard course of action that has been officially established by an organization."); *Webster's New International Dictionary* 1908 (2d ed. 1958) ("[a] settled or definite course or method adopted and followed by a government"). If anything, a policy that does not allow rank-and-file agents to be more aggressive is more clearly a "general" statement of policy because it advises the public of the manner in which the *entire agency* will exercise its discretion. The public need not guess about the idiosyncratic behavior of individual agents; the "course of action" is more "settled" and is actually "followed" agency-wide.

A contrary rule would undermine senior executives' ability to control the Executive Branch. See U.S. Const. Art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). The Secretary is responsible for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. 202(5). But the Secretary cannot set national policies without also exercising his authority

to "control, direct[], and supervis[e]" his subordinates. 8 U.S.C. 1103(a)(2). DHS must exercise discretion in millions of situations each year. The Secretary thus must have the ability, if he so chooses, to direct rank-and-file agents to exercise authority he delegated to them in the manner he concludes is most appropriate.

For decades, the INS and DHS have announced policies—without undertaking notice and comment—that used stated criteria while leaving little or no room for rank-and-file agents to take a different enforcement stance for case-specific reasons. For example, the 1989 and 1990 policies for providing "deferred enforced departure" to certain Chinese nationals did not permit case-by-case deviation. See *Recent Developments*, 66 No. 47 Interpreter Releases 1361, 1363 (Dec. 11, 1989) ("[W]e'll protect everyone."); see also 43 Fed. Reg. 2776 (Jan. 19, 1978) (notice that certain nurses "shall" be granted extended voluntary departure, without mention of case-specific deviation).

More broadly, senior prosecutors often set a bright-line policy with little or no room for individual prosecutors to proceed if the policy provides otherwise. For example, the "passive enforcement" policy in *Wayte* did not permit individual prosecutors to adopt an "active enforcement" stance. See 470 U.S. at 601-602, 613. The Department of Justice's "Petite Policy" generally precludes federal prosecution "following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied." Dep't of Justice, *United States Attorneys' Manual* § 9-2031(1) (2016). And senior prosecutors have established blanket policies against charging drug possession below weight thresholds (and theft below dollar

thresholds). Dep't of Justice, *United States Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws: A Report to the United States Congress* 6-10, 22-24 (1979). If enforcement policies lacking an additional layer of case-specific discretion triggered notice-and-comment requirements, all of those policies would be unlawful.

Prohibiting senior officials from announcing policies that bind rank-and-file agents, without first following notice-and-comment procedures, also "would create horrible incentives." Pierce 424. "If agencies are allowed to establish policies that limit the discretion of their employees only through use of the expensive and time-consuming notice and comment procedure, they rarely will choose to limit the discretion of their employees charged with enforcement and prosecutorial responsibilities." *Ibid.* "Alternatively, they will refuse to disclose those limits to the public." *Ibid.* Either way, "neither affected members of the public nor politically accountable government officials would be able to predict the actions of those employees or to know what policies an agency is attempting to implement." *Ibid.*

2. Even if "general statements of policy" had to permit rank-and-file agents to adopt a more aggressive stance for case-specific reasons, the Guidance is still valid because it permits such discretion. The Guidance provides that agents cannot defer action under DAPA for a particular individual who otherwise meets the specified criteria, without determining that a request "present[s] no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Pet. App. 417a; *e.g.*, J.A. 548-549 (discussing examples of discretionary rejections

under DACA based on arrest records or suspected gang affiliations).

The court of appeals dismissed (Pet. App. 55a-64a) DAPA's express requirements as pretext, based on the district court's finding that DHS approves the vast majority of requests under a different policy (the ongoing DACA policy). But a legal conclusion that the Guidance forecloses discretion does not follow from the district court's findings: Among other things, the rate at which DHS approves requests, for example, sheds little light on the existence of discretion to deny them because a self-selection bias skews the numbers. Individuals who have strong equities weighing against deferred action are unlikely to request deferred action in the first place. *Id.* at 136a-137a (King, J., dissenting).

More fundamentally, DHS has never implemented DAPA and there is no sound basis for concluding that it will do so in a way that eliminates the additional layer of discretion it specifies. "The presumption of regularity supports the[] prosecutorial decisions" of Executive Branch agencies, "and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation and internal quotation marks omitted). *Arizona* in turn underscores that when a facial challenge is brought to a sovereign's law-enforcement policy "even before [it] has gone into effect," and the policy could be implemented in some ways that are unlawful but other ways that "avoid these concerns," it is inappropriate to enjoin the policy on the assumption that the sovereign will act unlawfully. 132 S. Ct. at 2509-

2510. The proper time for such a challenge is instead "after [the policy] goes into effect." *Id.* at 2510.

IV. THE TAKE CARE CLAUSE PROVIDES NO BASIS FOR RELIEF

1. In a single paragraph in their brief in opposition, respondents assert that the Guidance violates the Take Care Clause, Art. II, § 3, because it is "incompatible with the express or implied will of Congress." Br. in Opp. 37 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment)). That assertion collapses into their argument that the Guidance exceeds the Secretary's statutory authority under the INA. As demonstrated above, however, the Guidance—far from being incompatible with the INA—is firmly supported by its text and structure, foundational principles concerning the exercise of enforcement discretion, and a long history, ratified by Congress, of the Secretary's exercising such discretion and issuing work authorization.

Even if respondents had sought to raise an independent constitutional argument, however, the Take Care Clause would furnish no basis for affirmative relief in an Article III court. For the Judicial Branch to undertake such an inquiry would express a "lack of the respect due" to the Nation's highest elected official, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), by assuming judicial superintendence over the exercise of Executive power that the Clause commits to the President. Indeed, this Court has recognized that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political," and not subject to judicial direc-

tion. *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867).

No court has ever taken that step, and there is no basis for entering those uncharted constitutional waters here. Respondents have no cause of action to raise such a claim, because neither the APA nor the Take Care Clause itself furnishes a right to sue to challenge the President's action or inaction. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992); cf. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-1384 (2015).[17] And if, contrary to our submission, this Court were to reach the merits of respondents' statutory challenges and find the Guidance unlawful on those grounds, there of course would be no reason even to consider any claim that the Guidance is unlawful under the Take Care Clause.

2. In any event, the Secretary is faithfully—and vigorously—executing the immigration laws, fully utilizing DHS's appropriations for enforcement and removing hundreds of thousands of aliens each year. See pp. 3-4, *supra*. Consistent with Congress's direction, the Secretary has directed DHS to focus its limited resources on border enforcement and removing serious criminals. For example, 70% of the aliens ICE removed in fiscal year 2015 were apprehended at or near the border; 59% of the total were convicted criminals. DHS, *ICE Enforcement and Removal Opera-*

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[17] In rendering an opinion that the Guidance is lawful, the Office of Legal Counsel (OLC) addressed considerations it concluded were relevant to the Executive's exercise of judgment under the Take Care Clause. J.A. 39-101. But the fact that OLC addressed those considerations in advising the Head of another Executive Department, see 28 U.S.C. 511, 512; cf. U.S. Const. Art. II, § 2, does not mean that they are enforceable in the courts.

tions Report: Fiscal Year 2015, at 8 (Dec. 22, 2015). The Guidance is intended to enable DHS to focus even more resources on removing serious criminals and policing the border, by expending fewer resources in encounters with the lowest priority aliens. See p. 44, *supra*. It provides a measure of repose to the people who are the lowest priority for removal, have particularly strong ties to this country, and whose removal would come at serious human cost. And in accordance with longstanding statutes, regulations, and practice, it provides for work authorization to enable the individuals whose presence is countenanced to work on the books, be self-sufficient, and avoid undermining protections for American workers during that period.

The exercise of discretion to take into account resource constraints, humanitarian concerns, and other equities as part of a broader enforcement strategy is not a violation of the Take Care Clause—it is a vital component of the faithful execution of the laws. See *Heckler*, 470 U.S. at 832; *Community for Creative Non-Violence* v. *Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (Bork, J.) ("The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws."). That is particularly true for immigration, where "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program," *Knauff*, 338 U.S. at 543 (citation omitted), and funding limits require the exercise of discretion on a vast scale. Before the Secretary issued the Guidance, OLC concluded in a lengthy opinion that it would constitute a lawful exercise of his discretion. J.A. 39-101. But even if the Court were to conclude otherwise, that would scarcely suggest that

the Secretary has not been "faithful" in carrying out the weighty and complex task of administering and enforcing the INA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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